No. 640

In the Supreme Court of the United States

OCTOBER TERM, 1947

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER,

v.

BIDWELL TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VERMONT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This suit involves the constitutionality of the Act of April 20, 1940 (c. 117, 54 Stat. 143), an act extending the jurisdiction of the federal district courts to suits between citizens of the District of Columbia, the Territory of Hawaii, or the Territory of Alaska, on the one hand, and citizens of any state or territory, on the other. The court below held the statute unconstitutional, and petitioner has filed a petition for a writ of certiorari to review that holding. The Solicitor General, on behalf of the United States, respectfully urges

that certiorari issue so that this Court may finally resolve the important constitutional question involved.

STATEMENT

This action was commenced by petitioner in the District Court of the United States for the District of Maryland, to recover the sum of $10,000, allegedly owing by respondent under the terms of a certain insurance contract. The complaint (R. 1–5) alleges that petitioner is a corporation incorporated under the laws of the District of Columbia, and respondent a corporation of the State of Virginia duly authorized and licensed to transact business in the State of Maryland (R. 1); that petitioner, as insurer, executed and delivered the insurance policy in question and filed a certificate thereof with the Interstate Commerce Commission, in compliance with Section II of the Interstate Commerce Act, as amended (*ibid.*); that an endorsement attached to the policy provided that respondent, the insured, reimburse petitioner for any payment made on account of any accident, claim, or suit involving a breach of the terms of the policy (R. 1–2); that petitioner was required to make certain payments because of such a breach by respondent (R. 2–4); and that respondent is liable for reimbursement of those sums to petitioner (R. 4). The jurisdiction of the district court is based upon 28 U. S. C. 41 (1) (R. 1).

On respondent's motion to dismiss the complaint (R. 5), the district court entered an order dismissing the complaint for lack of jurisdiction, the Act of April 20, 1940, being held "unconstitutional to the extent that it amends Section 41 (1) (b) of Title 28 U. S. C. A. by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different States" (R. 6). On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the judgment of the district court was affirmed, Senior Circuit Judge Parker dissenting (R. 22; 165 F. 2d 531).

The majority opinion, holding the Act of April 20, 1940 unconstitutional, was grounded on the following rationale (R. 10–18): (1) Congress, in enacting the 1940 statute, must be deemed to have acted exclusively under Article III, section 2 of the Constitution. (2) The District of Columbia, however, is not a "state" within the meaning of that term as used in Article III. (3) Consequently, Congress, acting under that article, had no power to vest the district courts with jurisdiction over civil actions based on the fact that some of the litigants are citizens of the District. (4) Moreover, even if Congress were presumed to have acted under Article I, section 8 (17) of the Constitution, the Act of April 20, 1940 is invalid. (5) This is so because the legislative power of Congress over the District of Columbia, though plenary and far-reaching, is to a very great extent

territorially limited to the District. (6) Moreover, Congress cannot, under the guise of exercising that power, extend the jurisdiction of the district courts beyond the limits of judicial power defined by Article III.

The dissent of Judge Parker, on the contrary, although agreeing that it was well settled that the District of Columbia is not a state within the meaning of the Constitution and that Article III, consequently, would not support the 1940 Act, urged its approval as a valid exercise of the congressional power under Article 1, section 8 (17) and (18) of the Constitution. Judge Parker was of the following view (R. 18–22): (1) Article III does not express the full authority of Congress to create courts, and Congress, acting under Article I, section 8 (17), may establish courts to hear any litigation to which a citizen of the District of Columbia is a party. (2) Such courts may be vested with the same judicial power as is vested in the federal courts created under Article III. (3) On like principle, Congress may vest in Article III courts, the judicial power which it is authorized to confer on courts established under Article I, section 8 (17). (4) The congressional power over the District of Columbia is not limited to the confines of the District. (5) Moreover, since Congress could authorize courts which it might create under that power to sit and their process to run anywhere in the country, there is

no reason why it cannot combine the jurisdiction of such courts with that of the district courts already created under Article III. (6) Such a holding is in harmony with the primary duty of the Government to secure justice for its citizens by assuring them access to an impartial judiciary.

On March 3, 1948, petitioner filed its petition for a writ of certiorari.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Act of April 20, 1940 (c. 117, 54 Stat. 143) reads as follows:[1]

> * * * That clause (b) of paragraph (1), section 24, of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 41; Supp. IV, title 28, sec. 41), be, and the same is hereby, amended to read as follows:
>
> (b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State of Territory.

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[1] 28 U. S. C. (41 (1)), as amended by the 1940 statute, reads, in pertinent part, as follows:

* * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or * * * is between citizens of a State and foreign States, citizens or subjects. * * *

(2) Article I, Section 8, of the Constitution of the United States, reads, in pertinent part, as follows:

> Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
>
> Cl. 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

(3) Article III, Section 1 of the Constitution of the United States, reads as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(4) Article III, Section 2, Clause 1 of the Constitution of the United States reads as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

DISCUSSION

1. As the Circuit Court of Appeals for the Seventh Circuit put it, in its recent opinion in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392, the Act of April 20, 1940, has afforded the federal courts "a 'field day' in constitutional erudition" (*id* at 395). Since the enactment of the statute, eleven district courts and two circuit courts of appeal have had occasion to pass on its constitutionality.

Three of these, all district courts, have upheld the Act; the remainder have rejected it.[2]

An act of Congress should not, however, be set aside as invalid without, first, a full consideration by this Court. And this is the first time that the issue has been presented to the Court. It is submitted, therefore, that the petition for a writ of certiorari should be granted so that the question may finally be resolved here.

2. By the Act of April 20, 1940, Congress sought to remove a discrimination to which the citizens of the District of Columbia had been subjected since 1805, when, in *Hepburn and Dundas* v. *Ellzey*, 2 Cr. 445, the Supreme Court held that

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[2] The Act has been upheld in *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.); *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif.); and *Duze* v. *Woolley*, 72 F. Supp. 422 (D. Hawaii).

It has been declared unconstitutional not only by the district court and the circuit court of appeals in the instant case, but also in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392; *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa); *Behlert* v. *James Foundation*, 60 F. Supp. 706 (S. D. N. Y.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (E. D. S. C.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Willis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); see, also, *Federal Deposit Insur. Corp.* v. *George-Howard*, 55 F. Supp. 921 (W. D. Mo.), reversed on other grounds, 153 F. 2d 591 (C. C. A. 8), certiorari denied, 329 U. S. 719.

The statute is also involved in an appeal now pending on second reargument in the Third Circuit Court of Appeals (*Van Sant* v. *American Express Co.*, No. 9044), where the United States has intervened in support of the legislation.

Congress had denied to them the access to the federal courts on grounds of diversity of citizenship which was available to the citizens of the states proper. Thus, Congress had deprived the citizens of the federal district of that forum—free from the supposed prejudices of the local courts against citizens of other, "foreign" states—which the Constitution had provided and Congress had supplied to citizens in general and, indeed, even to aliens. *Serè* v. *Pitot*, 6 Cr. 332, 337–338; *Bank of the United States* v. *Deveaux*, 5 Cr. 61, 87.

In the *Ellzey case*, the Court held that the jurisdiction conferred by the Judiciary Act of 1789 (1 Stat. 73, 78) on the circuit courts therein created, in cases between "a citizen of the State where the suit is brought, and a citizen of another State," did not contemplate suits between citizens of the District of Columbia and citizens of the states proper. 2 Cr. at 452. However, the decision, although sometimes read as announcing a rule of constitutional law (see *Hooe* v. *Jamieson*, 166 U. S. 395, 396–397; *O'Donoghue* v. *United States*, 299 U. S. 516, 543), decided no more than that the 1789 statute did not permit such suits. It did not hold that Congress might not authorize such actions by new legislation. Certainly, a study of the historical materials discloses no authority for so limiting the judicial power vested in Congress by Article III of the Constitution. The term

"state" might have been so used in the Judiciary Act of 1789 as to exclude the District of Columbia, but it is by no means necessarily true that it had been used in any equally restricted sense in the Constitution. See *Towne* v. *Eisner*, 245 U. S. 418, 425; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 71–72; Holmes, J., dissenting in *Eisner* v. *Macomber*, 252 U. S. 189, 219; and Brandeis, J., dissenting, *id.* at 234. Thus, in other connections, this Court has treated the District as a "state" within the meaning of that term as used in the Constitution. *Stoutenburgh* v. *Hennick*, 129 U. S. 141 (regulation of commerce "among the several states"); *Embry* v. *Palmer*, 107 U. S. 3 (full faith and credit to judicial proceedings of "every other state"); see, also, *Geofroy* v. *Riggs*, 133 U. S. 258; *Downes* v. *Bidwell*, 182 U. S. 244, 354–355 (Fuller, C. J., dissenting); *Grether* v. *Wright*, 75 Fed. 742, 753 (C. C. A. 6) (per Taft, C. J.); *Watson* v. *Brooks*, 13 Fed. 540, 543–544 (C. C. D. Ore.).

The District of Columbia has grown from a partially rural community of 14,093 persons in 1800 to an exclusively urban metropolis with a population of 663,091 in 1940; and of these residents in 1940, some 652,[illegible]00 were citizens of the United States.[1] Its citizens now trade and travel

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[1] U. S. Department of Commerce, *Sixteenth Census of United States, 1940, Population*, Vol. II (1), pp. 955, 960. There are no reliable statistics as to the number of permanent domiciliaries in the District. *The Washington Post*, in

throughout the United States and every day engage in numerous transactions with citizens of the states proper. It is only meet that they too, as well as the citizens of the states proper, should be permitted to sue in the independent federal courts.

3. Whatever the force of the *Ellzey* decision, however, it is plain that the Act of April 20, 1940, can be supported by constitutional grants of power other than those in Article III. When Chief Justice Marshall announced the *Ellzey* rule in 1805, he stated that the discrimination against

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connection with a recent survey of opinion in the District on local self-government, polled adults in 400 families, selected as a "random area sample of households" on a basis similar to that used by the Census Bureau and the Bureau of Labor Statistics, and determined that the following percentages of the sample had resided in the District of Columbia for these periods:

Percent of sample	*No. of years in District*
2	less than 1 year
14	1 year but less than 5 years
20	5 years but less than 10 years
43	more than 10 years
21	native born

(*The Washington Post*, Sunday, February 1, 1948.)

The Office of the Collector of Taxes for the District of Columbia advises us that approximately 120,000 income tax returns were filed by individual taxpayers in 1947, of which approximately half were joint returns; and that about 4,500 returns were filed by corporations in that year, of which about 1,600 were filed by domestic corporations.

Of course, in addition to the District's citizens, the decision below affects the rights of the 423,330 residents of the Territory of Hawaii and the 72,524 residents of the Territory of Alaska. U. S. Department of Commerce, *op. cit.*, Vol. I, pp. 1191, 1209.

District of Columbia citizens which it required could be remedied by appropriate legislation (2 Cr. at 453):

> It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. *But this is a subject for legislative, not for judicial consideration.* [Italics supplied.]

The Act of April 20, 1940, is the response to the Court's invitation (H. Rep. No. 1756, 76th Cong., 2d sess.)

The enlargement of the district courts' jurisdiction to encompass suits between citizens of the District of Columbia and citizens of the States proper was posited on the plenary power over the District conferred upon Congress by Article I, section 8 (17) and (18), *ibid.* It is the Government's position that those provisions afford ample authority for the legislation.

Article III "does not express the full authority of Congress to create courts." *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. And among the extra-Article III sources of authority to create "legislative" or "statutory" federal courts, as distinguished from the so-called "constitutional courts" (see *American Insurance Co.* v. *Canter*, 1 Pet. 511; *Ex parte Bakelite Corp.*, 279 U. S. 438; *Wil-*

liams v. *United States*, 289 U. S. 553) is the power of exclusive legislation over the District of Columbia. *O'Donoghue* v. *United States*, 289 U. S. 516, 545–548; and see also *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442–443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. By virtue of that power over the District, Congress may make available to its citizens national courts having the same general character and jurisdiction as the "constitutional" courts. *O'Donoghue* v. *United States*, 289 U. S. 516, 540–541. On like principle, we submit, it may enable its citizens to resort to the "constitutional" federal courts already created in the states proper.

The court below suggests that this plenary power of Congress over the federal district is limited territorially to the District boundaries. Any such endeavor so to restrict that vital power must fail, however, in light of the opinion read by Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264. It was there that this Court first boldly announced the broad sweep of the plenary power over the District of Columbia, which, like all other powers conferred by the Constitution upon Congress, is intended to be exercised as a national power by a national legislature, rather than as a local function by a municipal assembly. See *Cohens* v. *Virginia*, 6 Wheat. at 424–429, *passim*; see, also, *Embry* v. *Palmer*, 107 U. S. 3; *Neild* v. *District of Columbia*, 110 F. 2d 246, 250, 251 (App. D. C.);

This full measure of congressional power over the District has never been curtailed.

There is no more force to the contention of the majority below that the Act of April 20, 1940, must fail because it requires a merger in the federal district courts of judicial functions incidental to the exercise of Article I powers with such as are defined in Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516, clearly approves such a merger, at least in the "constitutional" courts of the District of Columbia. There is no reason why a similar merger should not also be appropriate for the federal courts in the states proper. Whatever the validity of the rule prohibiting the vesting of *legislative* or *administrative* functions in the so-called "constitutional" courts (other than those of the District of Columbia: see *Williams* v. *United States*, 289 U. S. 553, 565–567), the merger of *judicial* functions derived from Article III with *judicial* functions derived from other sections of the Constitution is in all respects proper. Indeed, to hold such a merger unauthorized would be, in effect, to deny the numerous grants of jurisdiction to the federal district courts to hear suits against the United States; for the adjudication of claims against the Government, although a judicial function, is outside the definition of the judicial power in Article III. *Williams* v. *United States*, 289 U. S. 553, 572–581. The entertainment of just such non-Article III suits against the Government by the federal dis-

trict courts in the forty-eight states has, of course, long been recognized and approved by this Court. See, for example, *United States* v. *Sherwood*, 312 U. S. 584; *United States* v. *Pfitsch*, 256 U. S. 547.

4. When the Constitution was drafted and when it was ratified, there was no federal district. The citizens who subsequently, in 1801, became citizens of the newly created District of Columbia[4] were at that time citizens of the States of Maryland and Virginia. Only later were the lands upon which these citizens resided ceded to the National Government. As this Court has said in another but closely related connection, "it is not reasonable to assume that the cession stripped them" of rights previously theirs under the new Constitution, "and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *O'Donoghue* v. *United States*, 289 U. S. 516, 540; see, also, *Downes* v. *Bidwell*, 182 U. S. 244, 260–261.

The holding, in 1805, that the District's citizens were barred from federal courts open not only to their Maryland and Virginia neighbors, but to all aliens, even those residing in the District of Columbia, was an "extraordinary" decision. *Hepburn and Dundas* v. *Ellzey*, 2 Cr. 445, 453.

[4] For a narrative account of the organization of the District, see *Morris* v. *United States*, 174 U. S. 196.

To hold, as the court below does, that the legislative action invited by *Ellzey* is futile to remedy the discrimination long suffered by the inhabitants of the District, is completely unjustifiable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted and that, on review, the judgment below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.